Precipitator Services Group, Inc. *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 4–CA–24627

April 20, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 5, 1997, Administrative Law Judge Richard H. Beddow Jr. issued the attached initial decision in this case. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an exception and an answering brief.

On June 7, 2000, the National Labor Relations Board remanded the case to the judge for further consideration in light of the Board's decision in *FES*, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), which sets forth the analytical framework for refusal-to-hire and refusal-to-consider allegations. After inviting and receiving briefs from the General Counsel and the Respondent, the judge, on October 27, 2000, issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We adopt the judge's finding that on January 23, 1996, the Respondent violated Section 8(a)(1) of the Act when its Field Superintendent, Ken Fortner, implicitly threatened employees David Packer, James Neumane, and Richard Deuhaut with unspecified reprisals when they gave him a letter from the Charging Party and displayed union insignia. We also agree with the judge, for the reasons set forth below, that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to consider and hire the Charging Party's paid union organizer, Millard "JD" Howell, on January 25, 1996, the second time he sought employment.

As discussed below, however, we find that the Respondent did not violate the Act by refusing to consider or hire Howell when he first sought employment with the Respondent on or about December 13, 1995, or on January 9 and 10, 1996, when the Respondent hired Packer, Neumane, and Deuhaut. We also disagree, for the reasons set forth below, with the judge's finding that on February 5, 1996, the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to consider and hire union members Ernest Patterson, Michael John Manculich, and John LaPoint.

I. ALLEGED REFUSALS TO CONSIDER AND HIRE HOWELL

A. Facts

The Respondent is engaged in the installation of pollution control equipment called precipitators at various locations throughout the United States. It usually, but not always, hires its employees at its headquarters in Tennessee. The precipitator installation at issue here, in Wysox, Pennsylvania, began in approximately September 1995 and continued through approximately May 1996. From September of 1995 through December 31, 1995, the Respondent was engaged in setup work. The only individuals working on the project during that period were employees who were already on the payroll, who had been assigned from Tennessee.

On December 13, 1995, Howell sought employment with the Respondent at the Pennsylvania jobsite and identified himself to Field Superintendent Fortner as an organizer for the Charging Party. Fortner informed Howell that the Respondent was "kind of full" at that time and was not hiring. Howell described his 20-plus years of experience in the trade, including his experience erecting precipitators, stated that his organizing efforts would not interfere with his work on the jobsite if he was hired, and asked for an application. Fortner replied that he was not giving out applications, but would take Howell's name and number. Howell wrote that information on a pad of paper furnished by Fortner.

About January 1, 1996,[2] Fortner decided to begin hiring locally at the Pennsylvania jobsite, instead of relying solely on employees assigned from Tennessee. Among other reasons for the change, Fortner testified, was that an insufficient number of employees from Tennessee were willing to work outside in the severe winter weather in Pennsylvania that year. On January 5, 6, and 7, the Respondent advertised its need for welders in a local Pennsylvania newspaper. In response, union members Packer, Neumane, and Deuhaut applied for work at the jobsite, and all three received offers of employment. The

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates referred to are in 1996 unless otherwise identified.

Respondent did not know of their union affiliation at that time.

On January 15, the three employees began working for the Respondent. On January 23, they hand-delivered to Fortner a letter from the Union identifying them as voluntary union organizers. Union organizer Howell was one of two persons who signed the letter for the Union. After Fortner read the letter, he told Packer, Neumane, and Deuhaut, three times, "[Y]ou don't want to give me that." While Fortner was speaking, the three employees affixed union stickers and buttons to their clothes, hard hats, and lunch pails. Fortner then told them, "[Y]ou don't want to put them on here."[3]

On January 25, Howell visited the jobsite and spoke again with Field Superintendent Fortner. Howell again identified himself as a union organizer, requested employment, revealed his relevant experience, and assured Fortner that his union organizing would not interfere with his work for the Respondent if he were hired. In response, Fortner testified that he stated, "We're not hiring right now," but he took Howell's telephone number. Fortner never called Howell.

In late January or the beginning of February, Fortner approached locally hired employee Neumane, stated that the Respondent would need new welders soon, and asked if Neumane knew of any. Neumane said, "Yes," and Fortner responded that he would get back to Neumane when he knew how many the Respondent needed. Fortner, however, did not get back to Neumane. On three different occasions over approximately the next week, the last being the same day Neumane distributed handbills about the Union to other employees, Neumane asked Fortner if he knew yet how many welders the Respondent would need. Each time Fortner responded that he did not know.

On different dates in early to mid-February, locally hired employees Packer, Neumane, and Deuhaut quit their employment with the Respondent for different reasons. The Respondent admits, and its records show, that it continued to hire welders for the Pennsylvania project after January 15, when those three employees began their employment, through the end of April.

B. Discussion

In *FES*, supra, the Board set forth the legal framework for determining whether an employer has discriminatorily refused to consider or hire individuals because of their union affiliation or activity. With respect to refusal-to-consider allegations, the General Counsel bears the burden of proving: (1) that the respondent excluded applicants from the hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Id. at 15. The burden then shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. Id.

With respect to refusal-to-hire allegations, the General Counsel has the burden of showing: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual, or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. If the General Counsel meets his burden, the respondent must show that it would have made the same hiring decision even in the absence of the applicants' union activity. Id. at 12.

1. Howell's December 13, 1995 attempt to seek employment

Applying those principles here, we find that the General Counsel has not shown that the Respondent unlawfully refused to consider Howell when he sought employment on December 13, 1995. Specifically, there is insufficient evidence that Howell was excluded from any hiring process. At the time that Howell first sought employment, the Respondent had no formal hiring process in place in Pennsylvania. Indeed, at that time, the Respondent had not yet hired anyone in Pennsylvania. Fortner truthfully advised Howell that the Respondent was not receiving applications, but Fortner did take Howell's name and telephone number.

The General Counsel presented no evidence that Howell was treated differently from other local applicants who may have approached Fortner during the same time frame. On this record, we find that the General Counsel has not established that the Respondent discriminatorily excluded Howell from consideration for employment. Accordingly, we dismiss the complaint insofar as it alleges that the Respondent unlawfully refused to consider Howell on December 13, 1995.

Similarly, we find that the General Counsel has not shown that the Respondent unlawfully refused to hire Howell on December 13, 1995. Specifically, the General Counsel has not established that the Respondent "was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct." Id. at 12. As set forth above, the testimony and documentary evidence establish that in December 1995, the Respondent was still engaged in setup, and all of that work was performed by employees

[3] As stated above, we agree with the judge that Fortner's statements violated the Act.

from Tennessee who were already on the payroll. In addition, the record fails to show that, at that time, the Respondent had plans to hire locally. We thus find that the Respondent did not unlawfully refuse to hire Howell on December 13, 1995.

The judge found, however, that the Respondent unlawfully refused to consider and hire Howell, not on December 13, 1995, when he first sought employment, but on January 9 and 10, 1996, when the Respondent hired the three employees who responded to the newspaper ad for welders. Citing *Eckert Fire Protection,* 332 NLRB 198 (2000), the judge reasoned that Howell's December 13, 1995 "attempt for employment was within 30 days of the noted hiring and was 'fresh.'" We disagree.

Unlike in *Eckert Fire Protection*, where the employer considered job applications to be current for 30 days, there was no showing here that the Respondent had any such "freshness" policy.[4] Consequently, the Respondent was free to consider and hire exclusively from among those employees who applied for work in response to the January want ad. Howell admitted that after December 13, 1995, he did not contact the Respondent about the welder positions it advertised in early January, and that he did not attempt to reapply until January 25. Howell, therefore, was not in the applicant pool when the Respondent made its hiring decisions on January 9 and 10. Accordingly, we reverse the judge's finding that the Respondent unlawfully refused to consider and hire Howell for the positions it filled on January 9 and 10.

2. Howell's January 25, 1996 attempt to seek employment

Although we find, for the reasons stated above, that the Respondent did not discriminate against Howell in either December or at the time it hired the other welders in early January, we affirm the judge's finding that the Respondent discriminatorily refused to hire Howell on January 25, when he returned to the jobsite and again sought employment.

First, it is clear from the testimony and documentary evidence that after January 15, when locally hired employees Packer, Neumane, and Deuhaut began their employment, the Respondent continued to hire additional local welders for the Pennsylvania project. In particular, the record shows that the Respondent hired at least one more welder in late January or early February, and at least three more later in February. Several others were hired through April. In addition, Fortner informed Neumane in late January that he needed more welders.

Therefore, the General Counsel has satisfied his *FES* burden of showing that the Respondent was hiring or had concrete plans to hire when Howell reapplied.

Second, the record evidence shows, and the Respondent does not contest, that Howell had the relevant welding experience or training. Thus, the General Counsel has proven the second element of *FES.*

Third, we find that the General Counsel has shown that antiunion animus contributed to the decision not to hire Howell. Howell identified himself as a union organizer to Field Superintendent Fortner and signed the January 23 letter from the Union identifying employees Packer, Neumane, and Deuhaut as voluntary union organizers. Fortner demonstrated antiunion animus when, in violation of Section 8(a)(1), he implicitly threatened those employees with unspecified reprisals when they gave him the letter. In addition, as just shown, the Respondent was hiring locally in late January. On January 25, however, Fortner lied to Howell about the availability of jobs by stating, "We're not hiring right now." See *Industrial Turnaround,* 321 NLRB 181, 188–189 (1996), enfd. in relevant part 115 F.3d 248 (4th Cir. 1997) (lying to union applicants about availability of jobs while hiring nonunion applicants supports finding of antiunion animus); *Nelcorp,* 332 NLRB 179 (2000), enfd. 51 Fed.Appx. 33 (2d Cir. 2002) (antiunion animus found where the respondent advised union that no openings existed, but the respondent filled at least nine positions with nonunion applicants).

Accordingly, we find that the General Counsel has met his burden of proof under *FES*. Therefore, the burden shifts to the Respondent to establish that it would not have hired Howell even in the absence of his union affiliation.

The Respondent asserts that by January 25, when Howell reapplied for work, the Respondent had reverted to its usual policy of hiring only in Tennessee, and that it did not hire Howell in accordance with that policy. For the following reasons, we find that the Respondent has not proved that defense.

First, Fortner's conversation with local hire Neumane in late January or the beginning of February indicates that the Respondent was looking for local welders during the time that Howell reapplied.

Second, the General Counsel subpoenaed the Respondent's weekly timesheets for the Pennsylvania project to obtain information about the workers hired for it. The documents provided by the Respondent, however, contain whiteouts and deletions for the period from the week

[4] The mere fact that Howell wrote his name and number on a pad from Fortner's desk does not establish that the Respondent had a "freshness" policy.

ending January 19 through the week ending April 5.[5] It is well established that an adverse inference may be drawn against a party that introduces incomplete or altered evidence, especially in response to a subpoena.[6] Because the documents provided by the Respondent have been altered, we infer that they do not support the Respondent's claim that, at the time Howell reapplied, the Respondent had wholly reverted to hiring only in Tennessee.

Third, although the record does not conclusively establish the number, identity, or hiring location of all the employees whose names were deleted, it is clear that at least some of the deleted names were local hires: every week that local hires Packer, Neumane, and Deuhaut worked (from January 15 through mid-February), their names were among those deleted from the weekly timesheets. Fortner testified that he believed this was because they were hired locally.[7] Furthermore, each of the weeks that Packer, Neumane, and Deuhaut worked, at least one name in addition to theirs appears to have been deleted. That includes the week that Howell reapplied, which ended January 26.[8] In addition, after Packer, Neumane, and Deuhaut left the Respondent's employ, at least one name and frequently more names were deleted every week but one, through the week ending April 5. Those deletions, in light of Fortner's testimony that the deletions were probably attributable to local hiring, strongly suggest that local hiring was occurring at the time that the Respondent refused to hire Howell. Thus, although the documentary evidence does not conclusively establish that local hiring was occurring when Howell reapplied, it certainly does not support the Respondent's defense that it was not occurring.

Fourth and finally, the winter that year was severe. If the Respondent was having trouble early in the year keeping Tennessee hires in Pennsylvania, and therefore began hiring locally, it is hardly likely that the situation would have changed significantly before the end of February.

For all those reasons, we conclude that the Respondent has not satisfied the burden of proving its affirmative defense that, when Howell reapplied on January 25, it had reverted to hiring only in Tennessee.[9] Thus, the Respondent has failed to show, as required by *FES,* that it would not have hired Howell even in the absence of his union affiliation. Consequently, we affirm the judge's finding that by refusing to hire Howell on January 25, the Respondent violated Section 8(a)(3) and (1) of the Act.[10]

II. ALLEGED REFUSAL TO CONSIDER AND HIRE PATTERSON, MANCULICH, AND LAPOINT

The judge found that on February 5, the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to consider and hire union members Ernest Patterson, Michael John Manculich, and John LaPoint. We reverse the judge's finding, because the General Counsel has not proved that the individual to whom the three tendered their applications was an agent of the Respondent.

A. Facts

On February 5, 1996, Patterson, Manculich, and LaPoint visited the Respondent's Pennsylvania jobsite. Patterson was wearing a coat emblazoned with union insignia, and Manculich and LaPoint were wearing hardhats bearing union insignia.

[5] The only weekly timesheet during that period which does not appear to have any deletions or whiteouts is the one for the week ending March 1.

[6] See *Wyandanch Day Care Center,* 324 NLRB 480, 482–483 (1997), enfd. 166 F.3d 1203 (2d Cir. 1998) (refusal to turn over subpoenaed information justifies inference that evidence would be unfavorable); *Fredericksburg Glass & Mirror,* 323 NLRB 165, 180 (1997) (refusal to turn over information responsive to subpoena led to inference that asserted reasons for discipline of employees were pretextual); *Autoworkers v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) (adverse inference rule in no way depends on subpoena but subpoena strengthens force of adverse inference).

[7] Fortner testified that local hires like Neumane, Deuhaut, and Packer were treated as independent contractors by the Company for purposes of benefits and paperwork, and that he believed this was the reason their names were deleted from the weekly time records. The Respondent, however, does not deny that its local hires were employees protected by the Act.

[8] The bottom eight entries were deleted from that week's timesheet.

[9] We need not decide whether, as proposed by the General Counsel, a reversion to Tennessee hiring, if it had been proved by the Respondent, would have been unlawful in itself had it been done in order to avoid hiring union-affiliated individuals in Pennsylvania. See *Casey Electric,* 313 NLRB 774, 775 (1994) (unlawful refusal to hire found where union applicants not advised of hiring only from employer's home base and policy appeared to change in response to union applications); *Ultrasystems Western Constructors,* 310 NLRB 545, 553–555 (1993), enf. denied on other grounds 18 F.3d 251 (4th Cir. 1994) (taking away hiring from local site where union sympathizers applied was evidence of antiunion animus in refusal to hire them).

[10] For similar reasons, we affirm the judge's finding that the Respondent violated Sec. 8(a) (3) and (1) by refusing to consider Howell for employment on January 25. Thus, the record shows that on January 25, Howell was discriminatorily denied further consideration in the hiring process when Fortner falsely told him that the Respondent was not hiring. The Respondent did not show that it would not have considered Howell even in the absence of his union affiliation.

As a remedial matter, the judge ordered instatement and backpay for Howell, consistent with *Dean General Contractors*, 285 NLRB 573 (1987). Chairman Battista recognizes that *Dean General* represents current Board law, but he has concerns as to whether that case was correctly decided. Accordingly, he would leave to compliance the issue of how long Howell, if he had not been discriminated against, would have remained an employee of the Respondent, and the related issue of which party bears the burden of proof on this matter. See *Construction Products*, 346 NLRB 640 fn. 2 (2006); *Quantum Electric, Inc.*, 341 NLRB 1270 fn. 2 (2004).

When Patterson, Manculich, and LaPoint entered the Respondent's trailer, a man with glasses was sitting behind a desk. Fortner, in his testimony, identified this person as "Jim." Fortner further testified that "Jim" was not associated with the Respondent, but was an employee of the contractor that subcontracted the precipitator installation work to the Respondent. According to Fortner, "Jim" was present at the site and in the trailer every day for about 4 weeks, where he would review documents with Fortner.

When Patterson, Manculich, and LaPoint went to the Respondent's trailer on February 5, Patterson asked "Jim" if the Respondent was hiring. "Jim" responded that "they had just hired three, but they would probably be needing some more welders." Patterson asked if they could put in an application and "Jim" said no, but asked them to write their names and numbers on a legal pad, which they did. "Jim" said that he would give their names and numbers "to the guy above him and let [Patterson, Manculich, and LaPoint] know if they needed anybody else." Thereafter, Patterson, Manculich, and LaPoint made no effort to contact the Respondent to determine the status of their applications. The Respondent never received the information taken by "Jim," and Patterson, Manculich, and LaPoint were not hired by the Respondent.

B. Discussion

The Respondent contends that Patterson, Manculich, and LaPoint did not apply for employment with it because "Jim" was not the Respondent's agent. We agree.

For a discriminatory refusal-to-consider or refusal-to-hire violation to be established, the alleged discriminatee must, of course, have sought employment from the employer. In this case, because the applicants dealt only with "Jim," it was therefore the General Counsel's burden to show that Jim was acting at the time as the agent of the Respondent. In our view, the General Counsel failed to make that showing.

In determining whether an individual is an agent of the employer, the Board applies the common law principles of agency as set forth in the Restatement (Second) of Agency. *Allegany Aggregates,* 311 NLRB 1165 (1993); *Dentech Corp.,* 294 NLRB 924, 925–926 (1989). Accordingly, the General Counsel was required to show that the Respondent had granted Jim actual or apparent authority.[11] And, contrary to the judge, statements of a putative agent do not constitute evidence of agency status. *MPG Transport, Ltd.,* 315 NLRB 489, 493 (1994), enfd. 91 F.3d 144 (6th Cir. 1996) (citing *Virginia Mfg. Co.,* 310 NLRB 1261, 1266 (1993), enfd. 27 F.3d 565 (4th Cir. 1994)); Restatement (Second) of Agency, supra at § 284, Comment d.

Thus, the relevant evidence before us is essentially limited to the fact that the Respondent allowed "Jim" to use the Respondent's trailer daily, for a 4-week period, to review documents. Plainly, that does not establish actual authority to receive employment applications on behalf of the Respondent, and we agree with the Respondent that it could not, standing alone, provide the applicants good reason to believe that "Jim" had apparent authority to do so.[12] Further, as mentioned above, "Jim's" statements to the applicants do not constitute evidence of agency status. Because the General Counsel has failed to prove that Patterson, Manculich, and LaPoint applied for employment with the Respondent, we reverse the judge's findings that the Respondent violated the Act by discriminatorily refusing to consider and hire them, and we shall dismiss those complaint allegations.

ORDER

The National Labor Relations Board orders that the Respondent, Precipitator Services Group, Inc., Elizabethton, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implicitly threatening employees with unspecified reprisals by telling them that they do not want to engage in activities that are within their Section 7 rights.

(b) Refusing to consider for employment or refusing to hire job applicants because of their membership in or activities on behalf of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[11] Actual authority is established where the employer actually authorizes the putative agent to act on its behalf, see *Alliance Rubber Co.,* 286 NLRB 645 (1987), or, under the doctrine of ratification, if the employer subsequently ratifies the putative agent's actions. See *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988); see also Sec. 2(13) of the Act. Apparent authority is established where the employer's manifestations to a third party provide a reasonable basis for the third party to believe that the employer has authorized the putative agent to do the acts in question. *Allegany Aggregates,* supra at 1165. See also *West Bay Maintenance*, supra at 83; Restatement (Second) of Agency, § 27, Comment a (1958).

[12] See *Dick Gore Real Estate*, supra at 999 fn. 3 ("Contrary to the Union's contention, we do not find that the mere presence of Gobin at the jobsite, on an almost daily basis, by itself, . . . placed Gobin in the position of having apparent authority. . . . Gobin was [legitimately] present at the jobsite to perform his duties coordinating subcontractors.")

(a) Within 14 days from the date of this Order, offer Millard "JD" Howell instatement to the position for which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges he would have enjoyed.

(b) Make Millard "JD" Howell whole for any loss of earnings and other benefits he may have suffered by reason of the discrimination against him, computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), taking into consideration the issues set forth in *Dean General Contractors,* 285 NLRB 573 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful refusal to consider for employment and refusal to hire Millard "JD" Howell, and within 3 days thereafter notify him in writing that this has been done and that the refusal to consider him for employment and refusal to hire him will not be used against him in any way.

(d) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Elizabethton, Tennessee facilities, and all current jobsites, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT implicitly threaten employees with unspecified reprisals by telling them that they do not want to engage in activities that are within their Section 7 rights.

WE WILL NOT refuse to consider for employment or refuse to hire job applicants because of their membership in or activities on behalf of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Millard "JD" Howell instatement to the position for which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges he would have enjoyed.

WE WILL make Millard "JD" Howell whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, less interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlaw-

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ful refusal to consider for employment and refusal to hire Millard "JD" Howell and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to consider him for employment and refusal to hire him will not be used against him in any way.

PRECIPITATOR SERVICES GROUP, INC.

Rick Wainstein and *Gregon J. Fons, Esqs*., for the General Counsel.
Michael L. Eggert, Esq., of State College, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on May 1, 1997. Subsequent to an extension in the filing date briefs were filed by the General Counsel[1] and the Respondent. The proceeding is based on a charge filed February 9, 1996,[2] by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. The Regional Director's complaint dated October 31, 1996, alleges that Respondent Precipitator Services Group, Inc., of Elizabethton, Tennessee, violated Section 8(a)(1) and (3) of the National Labor Relations Act by refusing to consider for hire four applicants because of their union membership or sympathies and by threatening to enforce a broad rule prohibiting union solicitation.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the installation and construction of precipitators at various points in the United States including one at the International Paper/Masonite project in Wysox, Pennsylvania. It annually conducts business operations and performs services valued in excess of $50,000 for customers located outside of Tennessee and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent's business makes it a contractor at jobsites owned by other parties, throughout the United States, however, its sole office and the only facility that it owns is located in Elizabethton, Tennessee. At any given time, depending on the number of jobs it has in operation, it employs between 10 and 200 field employees in varied classifications, including welders, electricians, iron workers, laborers, and carpenters.

The Company's normal hiring practice is to hire employees who apply at the main office rather than to hire employees at its various jobsites because it "likes" to hire employees who will be trained and stay with the Company and work at more than one jobsite over time. Field Superintendent Ken Fortner testified that since October 1994 he had supervised jobs at about 20 locations, and the only jobsite where local applicants were hired was at the Wysox, Pennsylvania job. He was aware of one other job (a job he did not supervise) in Colorado, where local jobsite applicants had been hired.

In September 1995, the Respondent (a nonunion employer), was subcontracted by another Tennessee company to install a new precipitator at the jobsite in Wysox near Towanda, Pennsylvania. The owner was International Paper, Masonite Division, and Rust Corporation was the general contractor. Fortner was in charge of the job for the Company, and he and about 11 other regular employees of the Company reported to the site on about September 5. Fortner did not have any employment applications at the jobsite at any time in 1995 because he had no initial plans to do any hiring at Wysox.

On December 13, 1995, Union Organizer Millard "J.D." Howell visited the Wysox jobsite along with several other union members who were applying for jobs with McBurney, another contractor that was building the boiler there. Howell asked a couple of men if they knew anyone else who was hiring and he was told to check at Respondent's trailer. Howell testified that he went by himself to the Respondent's trailer, entered and introduced himself to Fortner. He identified himself as an organizer for the Union, and asked if Fortner was hiring. Fortner replied that he was "kind of full" right then and was not hiring. Howell described his 20 plus years of experience in the trade, including his experience erecting precipitators and added that his organizing efforts among Respondent's employees wouldn't interfere with his productivity or my efficiency on the jobsite if he was hired and that he would give an honest day's work for an honest day's wages. Howell asked for an application, and Fortner replied that he did not give out applications, but would take Howell's name and number and Howell wrote the information on a pad from Fortner's desk. At that time nothing was said about the Respondent's future hiring plans. Otherwise, Fortner agreed that he was working at the Wysox jobsite in December 1995, but said that he could not recall talking to Howell prior to January 23, 1996, at which time several employees announced they were union members and organizers.

The Respondent closed its Wysox job for a Christmas break the last week of December. Meanwhile, the company concluded that it needed more welders to go to Wysox, but found no people in Tennessee who could go. Fortner therefore told General Foreman Dale Cordell to place an ad for welders in the local Towanda paper and on January 5, 6, and 7, 1996, the Respondent ran a blind ad in the Towanda Daily Review that read: "TWO Iron Worker/Welders needed immediately. Call 265–5567 anytime." Union Local 13 members David Packer, James Neumane, and Richard Dehaut, all of whom live in the jobsite area, applied for jobs at the jobsite, were hired, and started working on about Monday, January 15. They did not tell Re-

[1] The General Counsel's unopposed motion to correct transcript is granted and is received into evidence as GC Exh. 8 and his motion to receive late filed exhibits also is granted and GC Exhs. 6(a) and (b) and 7 are received into evidence.

[2] All following dates will be in 1996 unless otherwise indicated.

spondent about their union affiliation and Fortner did not know that they were union members when he hired them.

On their first day of work, Respondent sent Neumane and DeHaut to a jobsite orientation meeting that was run by general contractor Rust Corporation and owner International Paper. The employees were given a printed set of rules and safety policies of Rust and International Paper which included the following rule: "Distributing written or printed material and/or solicitation on company premises is not permitted." Fortner himself previously went through the orientation and received a copy of the rules, and he said that he read the rules and believed it was his responsibility to see to it that the rules were followed inasmuch as the rules state that: "As a general rule, all contractors shall be totally familiar with these regulations and provide adequate supervision at all times to insure compliance," and that the rules "must be followed by all employees present on any Masonite Corporation property."

At the beginning of the workday on January 23, Neumane, Dehaut, and Packer entered Respondent's jobsite trailer where Fortner and several other employees were gathered. Neumane handed Fortner a letter from union organizers J.D. Howell and James Bragan which stated that Neumane, Dehaut, and Packer "wish to be identified as voluntary union organizers" and that "any organizing activity will not interfere with these employees job duties." Dehaut and Neumane testified that Fortner opened and read the letter, then said (using a harsh tone of voice); to Neumane "You don't want to give me that." When Neumane did not respond, Fortner repeated, "I'm telling you, you don't want to give me that." Again Neumane did not reply, and Fortner said it a third time. While Fortner was speaking, the three union members were taking out union badges and stickers and placing them on their coveralls, hard hats, and dinner pails. Neumane testified that Fortner said, "You don't want to put them on there." The men did not respond, and Fortner again repeated two more times." Finally, Neumane said, "Well, you gotta do what you gotta do, and I'm going to do what I'm going to do."

Fortner testified that the employees' presentation of the Union's letter was the first he learned they were union members or organizers, but said he did not recall making the statements the employees attributed to him. He did admit that he told Neumane, "James, if you give me this letter I'll have to turn it over to [general contractor] Rust Engineering" and that later that morning he did give a copy of the letter to Rust and International Paper, because he believed he was required to do so by the rules stated in the Rust and International Paper's orientation materials.

Thereafter Neumane and Dehaut wore union insignia on a daily basis at the jobsite. Fortner did not ask them not to and he made no further comments concerning the insignia and no evidence was presented to indicate that the Company made any further effort to enforce any rules against solicitation and distribution at the Wysox jobsite. Neumane and Dehaut also testified that they engaged in handbilling at the jobsite in very late January or early February, and Fortner did not comment on it.

On January 25, before work, Organizer Howell visited Respondent's trailer and told Fortner that the employees had asked him to request recognition of the Union as their bargaining representative. Fortner said he had no authority to grant recognition, but would tell the Company's office. Howell said that if he did not hear from Fortner by noon then he would "know the answer is no." Howell then asked Fortner about going to work for Respondent, said he wanted a job and again said that organizing the employees would not interfere with my work on his jobsite. He said that Fortner told me that he would keep me in mind. Howell gave Fortner his home phone number, as well as the number of his motel room. He was not contacted.

Howell also testified that Fortner said

> Well, you're aware that there's a no solicitation policy here at the job site, and that the guys have already been told during their orientation that they couldn't be doing any solicitation . . . at the jobsite or one the premises.

Fortner admitted that January 25 visit occurred and the conversation in which Howell identified himself as a union organizer and asked about a job, that Howell gave him the phone number where he was staying, and "told me to call and we would go out to lunch together." Fortner testified he recalled no further conversation, but did not specifically deny discussing the no-solicitation rule.

On February 5, union members Ernest "Skip" Patterson, Michael John Manculich, and John LaPoint visited the jobsite. Patterson was wearing a jacket with the Union's name in large letters on the back, and Manculich and LaPoint were wearing hats with union insignia. As they approached Respondent's trailer, they spoke with Respondent's employee Gary Hatley and asked "Are they hiring any welders?" Hatley said that they had just hired three that morning, but probably were going to need more and directed them to Respondent's trailer. When the three men entered the trailer, there were a number of men present, and they spoke with a man sitting at a desk who was later identified in testimony by Fortner as employee of SES (the contractor to whom Respondent was a subcontractor) named Jim who regularly used Respondent's trailer. Patterson asked if they were hiring, and Jim said they had just hired three and did not need anyone right then, but they would probably be needing more welders in the future. Patterson asked for applications. Jim said he did not have any, but gave the men a pad and told them to write their names, phone numbers, and qualification on it, and said he would be in touch if he needed more welders. They did so and Patterson indicated they were "ready, willing and able to come to work at any time." Manculich recalled that the man said he would give their names and numbers to "the guy above him" and they would call the men if they needed them. They were not contacted.

Fortner denied that he ever heard about the visit from Patterson, Manculich, and LaPoint, or that he received anything from anyone showing their names. Company records indicate that it hired three employees (William, Scott, and Tipton) as welders in February 1996. Otherwise, the hiring summaries Respondent produced at trial were, according to Respondent's own witness, partly incorrect. The actual weekly payroll records that Respondent produced pursuant to the General Counsel's subpoena contained portions that had been whited out, and Respondent was unable to produce any records showing the individuals whose names and hours had been concealed.

According to the hiring summaries, as corrected by Fortner's testimony, a group of 12 employees (Cordell, Williams, Bruno, Edwards, Ray, White, Grindstaff, Sonny Elliott, Asher, Shell, Lawry, and Fortner) started at the jobsite on about September 5, 1995. Employees Randy Taylor and Tim Taylor began working at the jobsite on January 1, 1996, Gary Hatley on January 8, Fred Thomas on January 17, and Robbie Clouse on February 5. Like the 12 employees who preceded them, the two Taylors, Hatley, Thomas, and Clouse had all been working for Respondent for some time before they were assigned to the Wysox jobsite. Though their names were among those whited out on Respondent's payroll records, it is undisputed that new hires Neumane, Dehaut, and Packer were hired and began working at the jobsite on January 15. Contrary to Fortner's testimony that Respondent hired no new employees for the job after the union members were hired, Respondent's documents show that it hired three new welders Williams, Scott, and Tipton (hired in Tennessee) who began working on February 5, 13, and 22, respectively. From February onward, 17 out of the 23 employees who appeared at the jobsite were new hires, namely, Williams, Scott, Tipton, Murray, Rogers, West (West's hire date was March 14, 1996, see his application) Mason, Buskill, Denton, Baker, McMillian, Goodman, Romero, Allen, Hamm, Carpenter, and Collins. Assignments of then-current company employees from February 10 were Harney, Lee Taylor, Griffey, Sheele, Titus, and Hampton.

Fortner testified that Respondent's usual hiring practice is to conduct its hiring from its office in Tennessee, and that before he hired Neumane, Packer, and Dehaut at the jobsite, Respondent ran an ad in a Tennessee paper but received no response. The General Counsel subpoenaed records of such ads but Respondent produced none and admitted that it checked with local Tennessee papers where such ads were usually placed and learned that it placed none with them during the December 1995/January 1996 time period.

Respondent produced 11 applications it received in the week after the Pennsylvania ad, including those of Neumane, Dehaut, and Packer. Neumane testified that about a week after he presented the organizing letter (about January 30) Fortner approached him and asked if he knew any welders who could work on precipitators, and when Neumane said he did, Fortner said he was going to be needing more people the next week. Fortner testified that while he could not remember he "might have" asked Neumane about welders because Neumane, Dehaut, and Packer were "good workers and good welders," and "I would surely consider hiring somebody of their caliber."

Fortner testified that when local applicants approached him at the jobsite after January 15 he told them he was not taking applications, and that if Respondent hired anyone it would run an ad in the paper or would hire from Tennessee. According to Howell and Neumane, Fortner never said to them in their discussions about Respondent's hiring that Respondent would not hire from the jobsite or would hire only from its office in Tennessee, or would hire locally only after running an ad. Patterson, Manculich, and LaPointe also did not receive any such information when they left their names on February 5, and there is no evidence of actual ads being run in Tennessee at any time. Otherwise, the Respondent hired a number of new employees for the jobsite after Neumane, Dehaut, and Packer but Fortner testified that all were sent up to the jobsite by Respondent's main office in Tennessee.

The Respondent's records show Pennsylvania employees Neumane, Dehaut, and Packer listed separately on its employment summaries as "independent contractors." Jobsite payroll records (produced pursuant to the General Counsel's subpoena), show portions whited out including the jobsite payroll sheet for the week ending January 19, where five lines are whited out. Fortner examined the original whited out copy and testified that three of those lines corresponded to local hires Neumane, Dehaut, and Packer who were employed as "independent contractors" and of the two other whited out names, one was Gene Braddock. Respondent produced no records or testimony about how Braddock came to be hired or employed at the Wysox jobsite and his name does not appear on the summaries. The jobsite payroll sheet for the week ending January 24 was cut off, and it is impossible to tell how many names were excised, except that it must have included Neumane, Dehaut, and Packer. The payroll sheet for the week ending February 2 shows that six lines have been covered up, again including the three local hires. Four lines are missing from the sheet for the week ending February 9, and for the weeks ending February 16 and 23 (by which time the three union members had quit), there is one line missing. Two lines are whited out on the March 8 sheet, three lines on the March 15 sheet, four lines on the March 23 sheet, and so on. The whiteouts were discussed at the hearing, the Respondent was allowed additional time to produce copies of the records without whiteouts, and any other records showing the employment of the individuals whose names were whited out, as required by the General Counsel's subpoena. Thereafter, the Respondent's counsel informed the General Counsel that "it is Respondent's position that it does not have any other documents in its actual or constructive possession."

III. DISCUSSION

This proceeding involves the apparent failure of the Respondent to hire local union-affiliated job applicants for a Pennsylvania construction project which was staffed primarily with nonunion workers from Tennessee, the Respondent's home location, and a related alleged that it threatened to impose unspecified reprisals if certain other employees engaged in union solicitation or distribution on company premises.

A. The No-Solicitation Threat

The jobsite rule in question was communicated to both the Respondent and its employee by the general contractor and owner and it concisely states that "Distributing written or printed material and/or solicitation on company [premises] is not permitted."

This no-solicitation/no-distribution rule clearly extended to all times anywhere on company premises, including nonworking times and nonworking areas, and it is unlawfully overbroad. See *Ultrasystems Western Constructors*, 310 NLRB 545, 552 (1993). Respondent did not promulgate or maintain the rule, but Superintendent Fortner admitted the rules themselves stated that contractors had such a responsibility and he understood it

was his responsibility to enforce the rule.

Fortner testified that when he read the union organizing letter, given to him by employee Neumane, he said, "James, if you give me this letter I'll have to hand it over to Rust Engineering, and that he would do so because of the jobsite rule against "solicitation on site."

Employee witnesses Neumane and Dehaunt both gave credible testimony that Fortner made the remark, "you don't want to give me that," a phrase similar to the phrase admitted to in Fortner's testimony, and that he then repeated the phrase twice more, while using a harsh tone of voice. Fortner said that he didn't "remember" saying what Neumane and Dehaunt specifically recalled but he did not address the matter of whether he stated any phrase repeatedly.

Under these circumstances and in any evaluation of the demeanor of the witnesses, I find that the more detailed recall of witnesses Neumane and Dehaunt should be credited over Fortner's failure to recall and I conclude that Fortner said and repeated the phrase attributed to him.

The repetition of a statement to an employee that the employee doesn't want to do what he already has done (deliver a union organization letter), reasonably communicates an implied threat, a threat that was reinforced by a similarly reported comment to Newman when (as he credibly testified) he began to display union stickers. In the context of Fortner's reference to the jobsite no-solicitation rule, the clear nature of the statement that the employee did not want to do what he had already done to apparently break that rule, and the statement that the letter would be turned over to a higher authority, clearly communicated to the employees an implicit threat that they would suffer reprisals if they continued their protested conduct. Accordingly, I find that Fortner's threat of unspecified reprisals violated Section 8(a)(1) of the Act as alleged. See *Northern Wire Corp.,* 291 NLRB 727, 729–730 (1988).

B. Failure to Hire

The foundation of 8(a)(1) and (3) "failure to hire" allegations rest on the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–187 (1941). In this connection, the Board endorses a causation test turning on employer motivation. See *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Otherwise, the Board has established precedent on the issue and I find that the Board's application of the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *KRI Constructors,* 290 NLRB 802, 811 (1988), and cases cited therein are controlling. Based on this precedent, it is found that a prima facie case for an employer's unlawful refusal to hire a job applicant is established by the General Counsel when it is shown that: (1) an individual files an employment application, (2) the employer refused to hire a job applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against union activity, and (6) the employer refuses to hire the applicant because of such animus. In order to rebut the General Counsel's prima facie case, the employer must affirmatively establish that the applicant would not have been hired absent the discriminatory motive.

Here, the record shows that in September 1995 the Respondent started work at the Towanda jobsite with a dozen workers from its Tennessee home area. The subsequent actions by the alleged discriminatees in visiting the Respondent's jobsite office and in submitting job applications (or an equivalent substitute) clearly are protected activities, including the visits and job applications of union organizer Howell who clearly indicated his desire not only to apply for work but to provide the Company with a full day's work effort apart from his participation in any protected organizing activity. See *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995).

Here, I find that witness Howell gave specific, detailed, and believable testimony about the circumstance of his initial visit to the jobsite on December 13 and I credit Howell's testimony concerning a conversation with the Respondent's superintendent, Fortner, rather than Fortner's vague testimony that he couldn't "recall" meeting Howell prior to January 25. Fortner did admit that he was at the jobsite in December and his testimony that he did not have job application forms at the jobsite in December is consistent with Howell's testimony that when he asked for an application Fortner said he didn't give out applications.

Howell did give Fortner a verbal request for employment and a verbal account of his experience, including work on precipitators and, with Fortner's acquiescence, gave the Respondent his name and number on a pad provided by the Respondent. Howell again asked Fortner for a job on January 25. He was not told that Fortner then had job application forms at the jobsite but he again left written information with both his home and motel phone contact.

Witnesses Patterson and Manculich, along with applicant LaPoint, visited the jobsite on February 5, went to what was identified as the Respondent's office trailer, spoke to an older man behind a desk and asked if "they" were hiring. "Jim," the person behind the desk, said they had just hired three welders but would probably need more. Patterson asked if he had any applications, but "Jim" said he did not and gave them a legal pad and told them to give their names and phone numbers and that "he" would be in touch if more welders were needed. Each also put down that they were welders. Patterson then added that they were ready to come to work at any time and nothing was said by Jim about any other requirement for being considered as job applicants.

The Respondent argues that Fortner was never made aware of the visit of these three applicants and that the General Counsel cannot establish that the Respondent knew they were seeking jobs. I find, however, that the record is sufficient to show that "Jim" was a supervisor of the principal contractor to which the Respondent was subcontractor and that he held himself out to the applicants as being a senior person with authority to work behind a desk in the Respondent's office trailer. He also presented himself as a person with apparent authority to act on the Respondent's behalf with respect to knowledgeable information about the Respondent's recent and future hiring plans and with apparent authority to accept written information about their identity, how to be contacted, and their seeking jobs as welders.

This information was the equivalent of a job applicant and it was effectively placed in the possession of a person who was the Respondent's agent or a person with apparent authority to act on the Respondent's behalf. Accordingly, I conclude that the General Counsel has shown that Howell, Patterson, Manculich, and LaPoint each filed an "application" for employment with the Respondent.

Each applicant was either a union organizer or a union member. Howell made his identity as an organizer clear to Fortner, and the other applicants indicated on the written information that stated their desire for work as welders and that they were members of Local 154 of the Union. One also wore a union jacket and the others wore union hats in plain view of "Jim" and other employees who were in or near the Respondent's trailer and I conclude that the applicants are shown to have identified themselves as expected union supporters and that the Respondent had actual or constructive knowledge of their sympathies.

None of these applicants were hired nor were they even contacted about their availability or qualifications even though, about February 1, Fortner asked local employee Neumane if he knew any welders who had worked on precipitators and said he would be needing people the next week.

In fact, the Respondent told Howell on December 13 that it was "kind of full" and not hiring but it needed employees 3 weeks later, it ran a blind ad in the local paper but did not call Howell. Respondent hired three local employees through the blind ad. In late January, Howell returned and again solicited employment. Fortner told Howell that Respondent was not hiring, even though Respondent's records reveal that at that very time Respondent was in the process of hiring three welders from Tennessee who joined the work crew in February at Fortner's request.

Here, the Respondent displayed animus toward the Union by Fortner's unlawful 8(a) threats to voluntary organizers Neumane, Dehaut, and Packer on January 23, as discussed above. Further, Fortner lied to Howell on January 25 about the availability of jobs and I agree with the General Counsel that these facts are sufficient to show that the Respondent maintains animus against union activity and that the Respondent's failure to hire should be considered to be motivated by antiunion animus. See *Industrial Turnaround Corp.*, 321 NLRB 181, 188–189 (1996).

The Respondent's principal defense appears to be its claim that it didn't need to hire any (more) local employees as it had a full complement of employees. It also asserts that Howell was not hired because he didn't come to the jobsite after the ad was run on January 5–7 until January 25 when it already had hired three local applicants who responded to the ad. It also implies that it hired persons from Tennessee because they had connections with the company or were known to the Company and that it had a legitimate interest in hiring Tennessee people who would likely work for it on other jobs rather than locals who would not.

Significantly, the latter argument is refuted by the Respondent's own information that the one past local (rather than Tennessee) hire that Fortner was familiar with who was hired at a Colorado location but who thereafter continued with the company, including working for a time at the Waysox jobsite.

Here, I find that the Respondent's attempted explanation for its conduct falls far short of persuasively showing that it would not have hired these applicants absent the discriminatory motive.

As noted by the General Counsel, the winter of 1995–1996 was severe in Pennsylvania with a blizzard on January 7 and, according to Fortner, a lot of snow and rain and tremendously cold. He agreed that a lot of the Tennessee employees who came to the jobsite in January, February, and March left rather quickly. The job was completed about June 1; however, the records which could or should have shown specific details of the Respondent's hiring practices are altered, incomplete, or were not made available, even though they are the type of employment records that should be maintained for other Governmental agencies. The testimony and to some extent the records, do show, however, that the Respondent continued to seek and did employ welders with the same qualifications held by the four union retailed applicants that it failed to hire or contact during the first months of 1996.

The Respondent contends that after hiring only three local employees in response to its ad, it reverted to its normal practice of hiring workers who came from the area of its home office in Tennessee. No ads from Tennessee were shown to exist even though Fortner initially said the Respondent had recruited that way in early 1996. As noted above, records which could show other local hires or show a complete picture of its actual practices were altered, incomplete, or not made available and, accordingly, they do not support the Respondent's claim that it merely engaged in legitimate normal hiring practices and did not avoid hiring any more local welders after and because it learned of their union affiliations. In view of Fortner's February 1 statement to Neumane that it would need more people the next week and the apparent availability of the local applicants (and other local welders) qualified to do the work, I find that the Respondent's apparent practice of repeatedly bringing in new Tennessee workers who often stayed only a short time rather than hiring local workers experienced with local winter conditions, shows that its reason for not using more local employees was pretextual and indicative of an unlawful motive.

Matters pertaining to when and the specific number of jobs available are relevant to the compliance stage of this proceeding and do not affect the basic determination of the illegality of the Respondent's practice inasmuch as these clearly were some jobs available at the time the four applications were ignored and, under these circumstances, I find that the Respondent has failed to persuasively rebut the General Counsel's prima facie showing of unlawful motivation. Otherwise, I find that the General Counsel has met his overall burden and has shown that the Respondent's failure and refusal to consider and hire the four discriminatees named above violated Section 8(a)(3) and (1) of the Act, as alleged. See *P.S.E. Concrete Forms,* 303 NLRB 890 (1991).

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of

Section 2(5) of the Act.

3. By engaging in a pattern or practice of refusing to consider applicants for employment based on their suspected union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

4. By repeatedly telling employees that they did not want to engage in protected union activity, the Respondent implicitly threatened employees with unspecific reprisals and has interfered with, restrained and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

It having been found that Respondent unlawfully discriminated against job applicants Millard "JD" Howell, John LaPoint, Michael John Manculich, and Ernest "Skip" Patterson, based on their suspected union sympathies, it will be recommended that Respondent make such employees whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[3]

Other considerations regarding the remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding. See *Fluor Daniel Inc.*, 304 NLRB 970, 981 (1991), and *Dean General Contractors,* 285 NLRB 573–574 (1987). Otherwise, it is not considered necessary that a broad Order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Precipitator Service Group, Inc., Elizabethton, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment job applicants for the position of welder because they are members or sympathizers of the Union.

(b) Implicitly threatening employees with unspecified reprisals by telling them that they do not want to engage in activities that are within their rights guaranteed them by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Millard "JD" Howell, John LaPoint, Michael John Manculich, and Ernest "Skip" Patterson for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days of service by the Region, post at its Elizabethton, Tennessee facilities and all current jobsites copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for employment job appli-

[3] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cants for the position of welder because they are members or sympathizers of a union.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by implicitly threatening employees with unspecified reprisals by telling them that they do not want to engage in activities that are within their Section 7 rights.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole job applicants Millard "JD" Howell, John LaPoint, Michael John Manculich, and Ernest "Skip" Patterson for all losses they incurred as a result of the discrimination against them, in the manner specified in the section of the administrative law judge's decision entitled "The Remedy."

PRECIPITATOR SERVICES GROUP, INC.

Rick Wainstein and *Gregony J. Fons, Esqs.,* for the General Counsel.

Michael L. Eggert, Esq., of Altoona, Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on May 1, 1997, briefs were filed and a decision (JD–146–97) was issued on September 5, 1997.

On June 7, 2000, the Board remanded this case to me for further consideration in light of the May 11, 2000 decision in *FES*, 331 NLRB 9. On August 2, 2000, the parties were invited to file supplemental briefs addressing the issues set forth in the Board's remand including: "(1) the determination of whether there were available openings at the time [sic]of the alleged discrimination occurred and, if so how many openings were available; (2) whether the applicants had training and/or experience relevant to the announced or generally known requirements of the openings or whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied."

Subsequently, briefs were filed by the Respondent and the General Counsel. As noted in my invitation to file supplemental briefs in the prior decision herein, I found that the Respondent refused to consider four named applicants and that on page 3 of my decision dated September 5, 1997, I made the factual finding that on January 15, 1996, it hired three "covert" applicants and, on page 4, that it hired three other welders in February, and that, otherwise, the Respondent's payroll records had names that were whited out and concealed. Pages 5 and 6 of the decision also contains detailed findings on other hirings during January, February, and March, all of which would appear to satisfy the Board's remand item (1).

Page 2 of the prior decision noted that applicant Howell communicated to the Respondent that he had over 20 years' experience in the trade and specific experience erecting precipitators. Applicants Patterson, Manculich, and LaPoint are identified as union members and "welders" and they described their qualifications on a pad of paper and, as noted on page 8, nothing was said about any other requirements for the job. Moreover, Superintendent Fortner testified that the three union members who were hired after covertly seeking welding jobs were "good workers and good welders" and that he "would surely consider hiring somebody of their caliber."

Otherwise, I adopt my prior findings of fact, discussion, and conclusions of law as set forth in the prior decision and as supplemented by the additional discussion and the modified remedy and recommended Order set forth below and I find that good cause is not shown that would require reopening of the record.

The complaint in this case specifically alleges that the Respondent "refused to consider and hire" four named applicants.

In its supplemental brief, the Respondent contends that it did not have job openings at the times when the alleged discriminatees applied. It also contends that the question of whether Howell, Patterson, Manculich, and LaPoint had experience relevant to openings at Wysox cannot be addressed without reopening the evidentiary record and it asserts that at the time of the hearing in 1997 it did not present any detailed evidence as to what qualifications a welder had to satisfy to work at the Wysox jobsite, or cross-examine any of the alleged discriminatees concerning their purported qualifications because it was prior to the Board's new criteria.

As stated in the invitation to file briefs, page 2 of my prior decision noted that applicant Howell communicated to the Respondent that he had over 20 years' experience in the trade and specific experience erecting precipitators. Applicants Patterson, Manculich, and LaPoint are identified as union members and "welders" and they described their qualifications on a pad of paper and, as noted on page 8, nothing was said about any other requirements for the job. Moreover, superintendent Fortner testified that the three union members who were hired after "covertly seeking the welding jobs, were "good workers and good welders" and that he "would surely consider hiring somebody of their caliber."

Although the Respondent states that it is not willing to concede that any of the alleged discriminatees had sufficient training and experience to fill any openings at Wysox, I find that Howell, Patterson, Manculich, and LaPoint had training and experience relative to the requirements of the job and that they were essential as trained and qualified as the three covert applicants who were admittedly "good welders" and clearly had the qualifications for the job. See *Fred'K Wallace & Sons, Inc.,* 331 NLRB 914 (2000). Nothing was said about any unique qualification in its newspaper ads or when it hired the covert applicants and the Respondent cannot persuasively rebut the General Counsel's showing by cross-examination with subsequently developed concerns about qualifications that were not part of the hiring practice it utilized at the jobsite. Moreover, the record shows that many of the out-of-state welders did not work for long at the harsh winter conditions at the Pennsylvania jobsite and it appears likely that local welders would be better suited to the conditions and more likely to stay on the job.

At the time in 1996 when the Respondent rejected the application attempt discussed herein, it did not question the individual qualifications or suggest that the reason they were not con-

sidered and hired was because of any such concern. To the contrary, Jobsite Superintendent Fortner clearly testified that he would consider hiring workers of the caliber of the three local union workers who were hired and there it would be nothing but remote speculation to suggest that he would have subjected these applicants to some more highly critical evaluation of their qualifications beyond their experienced journeyman status and, in Howell's and Patterson's cases, specific experience with the construction of precipitators.[1]

The Respondent contends that although Howell applied for a position on December 13, 1995, it had no openings for any new employees, and did no new hiring during 1995 and that all of the persons who worked at the Wysox jobsite before January 9 and 10, 1996, were persons who had previously worked for it at other locations. It admits that it filled the first three openings that it had for new employees at Wysox on January 9 and 10, 1996—with Packer, Neumane, and Dehaut (after placing an ad in the local paper near Wysox), but asserts that these were not openings which should have been offered to Howell because the employer had a need to hire quickly and it may hire persons who actually come to the jobsite, rather than persons who have previously left their names as potential employees, citing *Dockendorf Electric*, 320 NLRB 4, 8 (1995). I find that the contention is inconsistent with the Respondent's other asserted practices of hiring only from Tennessee and, otherwise I find that Howell's attempt for employment was within 30 days of the noted hiring and was "fresh" as were the attempts by the other union applicant as compared to the dates in February and March when non-union welders were hired. Compare *Eckert Fire Protection et al,* 332 NLRB 198 (2000). As of January 30, the Respondent had not abandoned its practice to sometimes hire local welders because the record shows that on that date Superintendent Fortner asked union welder Neumane if he knew any welders who could work on precipitators as he was going to need people the following week and Fortner never informed Neumane or Howell that it would hire only from Tennessee (or after a new, local want ad). See *Nelson Electrical Contracting Corp.,* 332 NLRB 179 (2000). Moreover, on February 5, when the other union applicants went to the jobsite they were told that the Respondent had just hired three welders and were going to need more but nothing was said about any requirement that the hiring be done in Tennessee or when an ad appeared locally.

Respondent further asserts that it hired no new employees between January 10 and February 5, when it hired Danny Williams as a welder at its Tennessee office. He reported to the Wysox job on February 10 and, thereafter, new welders eventually sent to the Wysox jobsite were hired, all at its Tennessee office on the following dates: one on February 13 (J. Scott); three on February 22 (T. Tipton, J. Murray, and R. Rogers); one on March 14 (R. West); two on March 18 (T. Mason and D. Buskill); one on March 21 (M. Denton); one on March 24 (A. McMillian); one on April 8 (D. Allen); and one on April 25 (D. Collins), but it contends that these positions were filled pursuant to its normal practice to hire in Tennessee for jobs at other locations and that, accordingly, these were not job openings for persons applying for work at the Wysox jobsite.

Here, the state of the record is such that the Respondent is effectively precluded from offering documentary evidence that could tend to further refute the conclusions reached and explained in the initial decision.

As set forth in the prior decision I found:

> The Respondent's records show Pennsylvania employees Neumane, Dehaut and Packer listed separately on its employment summaries as "Independent contractors." Jobsite payroll records (produced pursuant to the General Counsel's subpoena), show portions whited out including the jobsite payroll sheet for the week ending January 19, where five lines are whited out. Fortner examined the original whited-out copy and testified that three of those lines corresponded to local hires Neumane, Dehaut and Packer who were employed as "independent contractors" and of the two other whited-out names, one was Gene Braddock. Respondent produced no records or testimony about how Braddock came to be hired or employed at the Wysox jobsite and his name does not appear on the summaries. The jobsite payroll sheet for the week ending January 24 was cut off, and it is impossible to tell how many names were excised, except that it must have included Neumane, Dehaut and Packer. The payroll sheet for the week ending February 2 shows that 6 lines have been covered up, again including the 3 local hires. Four lines are missing from the sheet for week ending February 9, and for the weeks ending February 16 and 23 (by which time the 3 union members had quit), there is one line missing. Two lines are whited out on the March 8 sheet, three lines on the March 15 sheet, four lines on the March 23 sheet, and so on. The white-outs were discussed at the hearing, the Respondent was allowed additional time to produce copies of the records without white-outs, and any other records showing the employment of the individuals whose names were whited out, as required by the General Counsel's subpoena. Thereafter the Respondent's counsel informed the General Counsel that "it is Respondent's position that it does not have any other documents in its actual constructive possession."

Under these circumstances, the Respondent cannot present documentary evidence in the compliance stage that it did not make available at the initial hearing and therefore I conclude that the best possible interpretation of the altered payroll records shows ambiguities and white outed entries (including the quitting of the three covert union employees), that indicate that a number of persons equal to or greater than the number of rejected union applicants were hired and put in the payroll during the critical period.

The Respondent's payroll records are altered in such a way that they can be evaluated as showing that some additional employees were on the payroll (perhaps as so-called independent contractors). In any event, although the Respondent's asserted policy of hiring only individuals from its home base in Tennessee would not be unlawful in itself, it cannot be used

[1] As noted by the General Counsel, the testimony shows that Howell and Patterson had specific experience welding on precipitators, LaPoint was a welder and boilermaker who had extensive experience in several crafts, and Manculich had 7 or 8 years of experience in the boilermaker trade, and had been welding for a longer period of time.

selectively or for the purpose of ensuring that it would not hire employees who were not connected with a union in the area of the jobsite. See *Ultrasystems Western Constructors*, 310 NLRB 545, 553–554 (1993). As found in the prior decision above, I otherwise explained and rejected that defense and I here reaffirm my conclusion that this explanation for its conduct falls short of persuasively showing that it would not have hired the alleged discriminatees absent the discriminatory motive.

I specifically find that a job became available for Howell in January when the Respondent placed local want ads, within 30 days of when he first applied and left his name and number and when he again applied on January 25. I find that there were four or more employment opportunities that opened up contemporaneously with the time that these four union applicants were ignored and, under these circumstances, I find that the Respondent has failed to persuasively rebut the General Counsel's prima facie showing of unlawful motivation. Otherwise, I find that the General Counsel has met his overall burden and has shown that the Respondent's failure and refusal to consider and hired the four discriminatees named above violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in a pattern of practice of refusing to consider or hire applicants for employment based on their suspected union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

4. By repeatedly telling employees that they did not want to engage in protected union activity, the Respondent implicitly threatened employees with unspecific reprisals and has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

It was recognized in selecting the remedy in the prior decision that employees were being hired in Pennsylvania for a specific project and, accordingly, no instatement remedy was recommended. In its supplemental brief, the General Counsel requests such a remedy citing the Board's *FES* decision. In accordance with that decision my recommendation will be modified to order instatement, however, the compliance stage of the proceeding may be used to determine the effective starting and ending dates of each unlawful refusal to hire and to determine if they would have been offered transfer to another project. See also *Serrano Painting*, 331 NLRB 928 (2000).

It having been found that the Respondent unlawfully discriminated against job applicants Millard "JD" Howell, John LaPoint, Michael John Manculich, and Ernest "Skip" Patterson, based on their suspected union sympathies, it will be recommended that Respondent offer them immediate and full instatement in the position for which they applied or if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[2] Otherwise, it is not considered necessary that a broad Order be issued.

[Recommended Order omitted from publication.]

[2] Under *New Horizons,* interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.